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No. 83-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

EDWIN P. KRIEGESMANN
Petitioner

vs.

BARRY-WEHMILLER COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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29 pp

QUESTIONS PRESENTED

. Did the Court of Appeals for the Eighth Circuit err in barring Petitioner's age discrimination claim because Petitioner allegedly filed his initial complaint with the EEOC more than 180 days after his termination when material issues of fact existed as to the equitable tolling of the 180-day limit including the failure of Respondent to post statutory notices and procedures were employed by Respondent designed to cause Petitioner to waive his rights.

PARTIES TO THE ACTION

Petitioner, Edwin P. Kriegesmann, is an individual residing in the State of Missouri previously employed by Respondent, Barry-Wehmiller Company, which is a Missouri Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Edwin P. Kriegesmann petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The opinion is reprinted as Appendix A in the separate appendix attached to this Petition. The opinion of the District

Court is not yet reported. It is reprinted as Appendix B in the separate appendix attached to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This case involves a summary judgment entered against Petitioner on his age discrimination claim brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. Section 621, et seq. The District Court granted summary judgment in favor of Respondent Barry-Wehmiller Company on the grounds that Kriegesmann had filed his administrative complaint with the EEOC more than 180 days after Petitioner's termination and was thus barred from pursuing his claim pursuant to 29 U.S.C. Section 626(d). The Court of Appeals for the Eighth Circuit in a

per curium opinion affirmed the judgment of the District Court.

This action was filed on behalf of Petitioner Kriegesmann based on his complaint that he had been terminated from his employment by Respondent Barry-Wehmiller Company on January 22, 1982. At the time of his dismissal, Petitioner was 56 years of age. In his complaint Petitioner alleged that his age played a substantial part in Barry-Wehmiller's decision to terminate him.

Petitioner was born July 12, 1925 with his highest level of education consisting of two years in high school. See, Plaintiff's deposition transcript, hereinafter referred to as "(T.__)," at page 8. Kriegesmann began his employment with Barry-Wehmiller in April, 1961 and gradually rose through the company ranks to become its tooling superintendent for the company's manufacturing facility (T.17).

On January 22, 1982 Petitioner was called to his supervisor's office where he was

terminated from his employment allegedly because the company was eliminating his position. (T.49-51).

Approximately one week later, Petitioner was called to Respondent's personnel office where he met with the personnel director, Borchelt, who informed Petitioner that he was eligible for twenty-one weeks of termination pay and four weeks of accrued vacation pay. Petitioner was further informed that he could accept these benefits in weekly installments and still receive his hospitalization and insurance benefits provided by Barry-Wehmiller Company. At that time, he was affirmatively encouraged by Borchelt to receive the benefits in weekly installments for a twenty-five-week period. (T. 55-57).

In addition to affirmatively encouraging Kriegesmann to take his benefits in weekly installments, Borchelt promised to assist Kriegesmann in finding other employment. Within a few days of Kriegesmann's and

Borchelt's meeting, Borchelt suggested the name of at least one company to Petitioner as a prospect for employment. (T.65).

On October 21, 1982, 272 days from the date of Kriegesmann termination on January 22, 1982, and 97 days from the date of the expiration of his severance benefits, Petitioner filed his complaint of age discrimination with the Equal Employment Opportunity Commission. After unsuccessful attempts to conciliate the complaint, Petitioner filed his complaint in the United States District Court of the Eastern District of Missouri on July 11, 1983.

On November 16, 1983, Respondent filed its Motion for Summary Judgment on the grounds that Petitioner Kriegesmann had failed to file his complaint of age discrimination within 180 days from the date of his termination on January 22, 1982. Both the District Court and the Eighth Circuit sustained Respondent Barry-Wehmiller's position granting summary judgment

on the grounds that Petitioner had not timely filed his administrative complaint with the EEOC. This Petition followed seeking relief from the summary judgment entered against Petitioner.

REASON FOR GRANTING THE WRIT

ARGUMENT

Rule 17 of this Court provides that a Writ of Certiorari may be granted where the decision of the lower court is in conflict with other decisions of the federal courts of appeals and where the lower court has sanctioned a departure from accepted procedures requiring a Writ of Certiorari to issue in order to correct the deficiencies. Both of these circumstances obtain in the instant case.

The District Court erroneously granted summary judgment in favor of Respondent in spite of material issues of fact being presented to the Court during its consideration of the Motion for Summary

Judgment. The particular facts presented in this case demonstrate that Respondent took affirmative steps to "lull" Petitioner into waiting beyond the 180 days from his date of termination before he filed his complaint of age discrimination with the EEOC. Thus, equitable tolling of the 180-day limitation contained in 19 U.S.C. Section 626(d) was demonstrated, or, at the very least, a material issue of fact was present as to the issue of equitable tolling.

Title 29 U.S.C. Section 626(d) provides in part that:

> "No civil action may be commenced by any individual under this section until the individual has given the secretary not less than 60 days notice of an intent to file such action. Such notice shall be filed:
>
> 1. Within 180 days after the alleged unlawful practice occurred."

It is established in the courts of appeals that the 180 day limitation is similar to a Statute of Limitations and is subject to equitable tolling. See, Nielsen v. Western

Electric Co., 603 F.2d 741 (8th Cir. 1979); Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976).

Other courts have noted that summary judgment under Rule 56 is inappropriate on the issue of timely filing of EEOC notices in age discrimination cases where there is a material issue of fact regarding the issue of equitable tolling. See , Aronsen v. Crown-Zellerbach, 662 F.2d 584 (9th Cir. 1981); cert denied 103 S.Ct. 1183. In Aronsen the court noted that: "On review of a grant of summary judment, it must appear that the facts as alleged could not reasonably be construed as being equitable estoppel or tolling." In Aronsen, the facts were similar to the instant case where the court noted that:

> "Aronsen offers the inferred fact that he was inhibited from filing notice with the ADEA for fear of losing his "terminal year" severance pay, losing his eligibility for early retirement, and losing company aid in finding other work. Whether this inhibition was reasonable under the circumstances and whether it was the result of a plan that would intentionally or foreseeably lull grievance

> and delay ADEA filings are factual questions pertinent to the equitable estoppel issue that are improper for summary judgment treatment. The facts could support an estoppel argument." See, Arsonsen, at p.595.

Thus, both the decisions of the District Court and the Court of Appeals for the Eighth Circuit are in conflict with Aronsen in that a material issue of fact was present as to whether Petitioner's belief that he would lose his severance pay, insurance benefits, and employment referrals legitimately deterred him from timely filing his ADEA complaint. Summary judgment under Rule 56 was inappropriate under the circumstances.

Finally, this issue of adequate notice was before the Trial Court and the Court of Appeals in deciding adversely to Petitioner. The Court of Appeals indicated that the issue of the adequacy of notice was not presented at the Trial Court and therefore could not be a basis for reversal. However, in granting summary judgment pursuant to Rule 56, there must not be any material issue of fact left to

be resolved. This issue of notice was raised in the original Motion for Summary Judgment by Respondent when it claimed that the notice was posted. However, the issue as to the adequacy of the notice was never resolved by the Trial Court and could not be because there was no evidence in the record pertaining to the adequacy of such notice. Therefore, the Trial Court and the Court of Appeals erroneously granted summary judgment when a material issue of fact as to the adequacy of Respondent's notice remains unresolved. See, Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978).

CONCLUSION

For the above stated reasons, it is respectfully requested that a Writ of Certiorari issue for the United States Court of Appeals for the Eighth Circuit.

RUPPERT AND BENJAMIN

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CERTIFICATE OF SERVICE:

A copy of the foregoing has been served upon Mr. Gerald M. Richardson, Attorney for Respondent, 1800 Equitable Building, 10 South Broadway, St. Louis, Missouri 63102, by depositing same in regular U.S. Mails, postage prepaid, this 24 day of September 1984.

Cyn Oldham

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1215

Edwin P. Kriegesmann, Appellant, v. Barry-Wehmiller Company Appellee.	* * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: June 20, 1984

Filed: July 19, 1984

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge

---

PER CURIAM.

Edwin P. Kriegesmann appeals from the district court's[1] grant of summary judgment and dismissal of his age discrimination action under the Age Discrimination in Employment Act

---

[1]The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern and Western Districts of Missouri.

(ADEA), 29 U.S.C. Sections 621-634, against the Barry-Wehmiller Company (the employer). For reversal appellant argues that the district court erred in holding that his action was untimely because the employer's actions did not equitably toll the time for filing a charge with the Equal Employment Opportunity Commission (EEOC). For the reasons discussed below, we affirm.

Appellant began working for the employer in 1961 and was eventually promoted to the position of tooling superintendent for the employer's manufacturing facility. On January 22, 1982, appellant's supervisor notified him that his job was terminated effective immediately. He was told to clean out his desk and leave that day. The Personnel Director met with appellant one week later to discuss severance pay. Appellant was eligible for twenty-one weeks of termination pay and four weeks of accrued vacation pay, which he could elect to receive in a lump-sum or over a

twenty-five week period. If appellant chose to receive the payments in weekly installments, his health and insurance benefits would continue for as long as he received payments. Those benefits would terminate immediately if he received a lump-sum payment. Appellant chose to receive the payments in weekly installments. The Personnel Dirctor later offered to assist appellant in finding other employment and recommended the name of at least one other company where he could apply. Appellant received severance and vacation pay through July 30, 1982. On October 21, 1982, he filed his age discrimination charge with EEOC, 272 days after his termination on January 22, 1982. Appellant claimed that he was fired solely on the basis of his age and younger employees were promoted to take his place.

After unsuccessful attempts to conciliate appellant's EEOC charge, he filed the present action in federal district court. The

employer moved for summary judgment on the ground that appellant's action was untimely because he had not filed a charge of unlawful discrimination with the EEOC within 180 days of the alleged unlawful termination, as required by 29 U.S.C. Section 626(d).[2] Appellant responded that the time for filing the EEOC charge did not begin to run until the severance benefits ended because the employer's actions constituted a continuing violation. Moreover, appellant argues that

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[2]29 U.S.C. Section 626(d) 'provides in pertinent part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed--
>
> (1) within 180 days after the alleged unlawful practice occurred;
>
> . . . .
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

the employer's actions justified equitable tolling of the 180-day limitations period. In support of this contention, appellant stated that the employer would have cut off his severance benefits in retaliation if he had filed an age discrimiantion charge with the EEOC; the employer had misrepresented the reasons for discharging appellant; the employer promised him future employment; and the employer was not prejudiced by the delay in filing. The district court rejected these arguments and granted the employer's motion for summary judgment.

The appellant maintains that the district court erred as a matter of law in granting summary judgment. First, appellant alleges that the employer's failure to post a notice of his rights under the ADEA violated 29 U.S.C. Section 627 and justified equitable tolling of the 180-day filing period. Appellant did not present this theory to the trial court, and we will not consider it for

the first time on appeal. See 10 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure Section 2716 at 650-54 (1983).

Second, appellant claims that by extending the severance benefits over a twenty-five week period and offering to help him find other employment, the employer lulled him into sleeping on his rights. As indicated, appellant argues that if he had filed a discrimination charge with EEOC, the employer may have retaliated by cutting his severance benefits or sabotaging his efforts to find a new job. Appellant denominates these actions "constructive misrepresentation." We agree with the Fourth Circuit that, as a matter of law,

> the attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel. The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should

unmistakably have understood would cause the employee to delay filing his charge.

Price v. Litton Business Systems, Inc., 694 F.2d, 965 (4th Cir. 1982) (footnote and citation omitted). The employer's actions asserted in the present case -- the provision of severance benefits and job referrals -- were not likely to mislead appellant into sleeping on his rights. The undisputed facts reveal no deliberate conduct on the part of the employer to lull appellant into delaying the filing of his ADEA charge.

Finally, appellant argues that the late filing of his charge would not prejudice the employer. The ADEA's 180-day filing requirement is in the nature of a statue of limitations and subject to equitable tolling. See Hrzenak v. White Westhinghouse Appliance Co., 682 F.2d 714, 717 n.6 (8th Cir. 1982). The absence of prejudice to an opponent does not support invocation of the doctrine of equitable tolling. Equitable tolling arises upon some poistive misconduct by the party

against whom it is asserted. As discussed above, the undisputed facts reveal no such misconduct by the employer. Because the undisputed facts disclosed on the record reveal that as a matter of law equitable estoppel could not apply, summary judgment for the employer was appropriate.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eight Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EDWIN P. KRIEGESMANN, Plaintiff,	)	
vs.,	)	No. 83-1651 C (5)
BARRY-WEHMILLER COMPANY Defendant.	)	

JUDGMENT

This matter having come before the Court, the Honorable Stephen N. Limbaugh, District Judge, presiding, on the defendant's motion for summary judgment, and said motion having been granted as set forth in the Memorandum and Order dated January 12, 1984,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff take nothing by his cause of action, that the action be dismissed on the merits, and that the defendant recover of the plaintiff cost of the action.

Dated this 12th day of January, 1984.

s/ Stephen N. Limbaugh
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EDWIN P. KRIEGESMANN,	)	
	)	
Plaintiff,	)	
	)	
vs.,	)	No. 83-1651 C (5)
	)	
BARRY-WEHMILLER COMPANY	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

The matter before the court is the defendant's motion for summary judgment, which will be granted. The plaintiff has responded.

The plaintiff is suing his former employer for discharging him in violation of the Age Discrimination in Employment Act, 29 USC Section 621 et seq. The ground for the motion is that the plaintiff did not file a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the alleged unlawful employment practice as required under 29 USC Section 626(d).

It is undisputed that the plaintiff was told his position was terminated on January

22, 1982; that he was told to clean out his desk and leave that day; that his last day at work was January 22; that he received severance and vacation pay through July 30, 1982; and that the filed his charge with EEOC on October 21, 1982, more than 180 days after January 22.

The plaintiff argues that his cause of action accrued on July 30, 1982, when the severance and vacation pay ended, but this contention is incorrect. The 180-day period began running January 22, which is when the plaintiff was told his job was terminated and that he should leave and when he stopped working. The subsequent termination of severance pay was merely a consequence of a prior alleged discriminatory act, the termination on January 22. Price v. Litton Business Systems, 694 F.2d 963 (4th Cir. 1982); Lawson v.Burlington Industries, Inc., 683 F.2d 862 (4th Cir. 1982); cf. Delaware

State College v. Ricks, 440 U.S. 250 (1980)(Title VII case).

The next issue is whether the plaintiff has justified equitable tolling of the 180-day limitations period by showing improper conduct on the part of the defendant. See Price, supra.; Neilsen v. Western Electric Co. 603 F.2d 741 (8th Cir. 1979). The plaintiff set forth four reasons for equitable tolling.

First, the plaintiff's attorneys argue that the plaintiff would have been subject to a retalitory cut-off of severance pay if he had filed a charge. The plaintiff, however, has adduced no evidence that such retaliation would have occurred or even that the plaintiff delayed filing because he feared retaliation. Furthermore, mere fear of retaliation alone would be insufficient, as improper conduct on the part of the defendant must be shown.

Next, the plaintiff argues that the defendant misrepresented the reasons for the plaintiff's discharge. The plaintiff has

presented no evidence that the alleged misrepresentations caused the delay in filing.

Third, the plaintiff claims that the defendant promised him future employment. As evidence, the plaintiff refers to Pl. Ex. A, a letter from the defendant which referred to the termination as a layoff and which indicated that the plaintiff might be called back. The letter, however, is dated August 12, 1982, more than 180 days after January 22. Any act of the defendant after the 180-day period ended does not justify tolling, as it could not have caused the delay in filing. The plaintiff also stated at his deposition that he knew he was terminated on January 22, and that he applied for work elsewhere after that date.

Finally, the plaintiff argues that the defendant was not prejudiced by the delay in filing. Assuming this is true, the arugment fails because tolling requires improper conduct on the part of the defendant and a

statute of limitations cannot be set aside merely because the defendant is not prejudiced.

The plaintiff has not argued that the defendant concealed his rights under the Age Discrimination Act. He had seen an EEOC poster relating to age discrimination which had been posted, and he threatened to sue the defendant (by which he meant suit under the ADEA) when he was told of his dismissal on January 22. Dep. at 54 111-12. The Court also notes that the plaintiff has not even submitted an affidavit explaining why he delayed filing.

There being no genuine issue of material fact,

IT IS HEREBY ORDERED that the defendant's motion for summary judgment be and is GRANTED.

Dated this 12th day of January, 1984.

s/ Stephen N. Limbaugh
United States District Judge